MOTION FILED
AUG 2 - 2004

No. 04-6-

(5)

IN THE
# Supreme Court of the United States

DENNY'S, INCORPORATED, IN ITS FIDUCIARY CAPACITY AS PLAN ADMINISTRATOR; DENNY'S, INCORPORATED VACATION PAY PLAN; ANDREW F. GREEN, IN HIS CAPACITY AS TRUSTEE OF THE DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST; DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST,
*Petitioners*,

v.

CHUCK CAKE, IN HIS CAPACITY AS ACTING DIRECTOR OF THE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS; ARTHUR LUJAN, IN HIS CAPACITY AS THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## MOTION OF THE NATIONAL COUNCIL OF CHAIN RESTAURANTS FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* and BRIEF FOR THE NATIONAL COUNCIL OF CHAIN RESTAURANTS AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## MOTION OF THE NATIONAL COUNCIL OF CHAIN RESTAURANTS FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37, the National Council of Chain Restaurants (hereinafter "NCCR") respectfully moves this Court to grant it leave to file the attached brief as *amicus curiae* in support of the petition for writ of *certiorari* in the above captioned case. The Petitioners have consented to NCCR's participation in this matter. The Respondents have withheld their consent, necessitating this Motion.

NCCR is a national trade industry group representing the interests of twenty-four of the nation's largest multi-unit, multi-state chain restaurant companies. Collectively, these companies own and operate in excess of 50,000 restaurant facilities. Additionally, through franchise and licensing agreements, another 70,000 facilities are operated under their trademarks. In the aggregate, the NCCR member companies and their franchisees employ in excess of three million individuals in all fifty states. NCCR takes a particular interest in those legal matters where a potential outcome could adversely affect the policies, practices, or legal rights of NCCR member companies.

All of NCCR's member companies administer employee benefit plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* [1]

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[1] NCCR understands that the Respondents may have withheld consent based on their position that the Petitioners' employee benefit plan at issue is not an ERISA plan. This is not the appropriate stage of litigation to raise such an argument. The Fourth Circuit addressed this issue when it stated, ". . . we presume Denny's is an ERISA fiduciary for purposes of jurisdiction." *Denny's, Inc. v.* Cake, 364 F.3d 521, 525 n.4. The court concluded the discussion of this issue by stating that "we leave any objections [to whether Denny's plan is an ERISA plan] to be dealt with 'as a direct attack on the merits of the plaintiff's case.'" *Id., citing United*

These ERISA plans provide billions of dollars of employee benefits to members' employees and beneficiaries. While members incur significant costs and bear substantial administrative burdens in creating and administering ERISA plans, members receive various protections from ERISA provisions that enable them to reduce their administrative costs and reduce their exposure to legal liability, including ERISA's policy of providing "ready access to Federal courts," preemption of state laws, and empowerment to seek equitable relief.

This case has a direct bearing on the effectiveness of ERISA's preemption and equitable relief protections. As a representative of employers administering ERISA plans, NCCR is well suited to share with the Court the practical impact the erosion of these protections may have on employers. For these reasons, NCCR respectfully requests that its motion for leave to file the accompanying brief as *amicus curiae* be granted.

Respectfully submitted,

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*States v. North Carolina*, 180 F.3d 574, 580 (4th Cir. 1999) (internal quotation marks and citation omitted).

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF FOR THE NATIONAL COUNCIL OF CHAIN RESTAURANTS AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### INTEREST OF THE *AMICUS CURIAE*

As stated in the accompanying motion for leave, the National Council of Chain Restaurants (hereinafter "NCCR")[1] is a national trade industry group representing the

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party. No monetary

interests of twenty-four of the nation's largest multi-unit, multi-state chain restaurant companies. Collectively, these twenty-four companies own and operate in excess of 50,000 restaurant facilities. Additionally, through franchise and licensing agreements, another 70,000 facilities are operated under their trademarks. In the aggregate, NCCR's member companies and their franchisees employ in excess of three million individuals in all fifty states. NCCR takes a particular interest in those legal matters where a potential outcome could adversely affect the policies, practices, or legal rights of NCCR member companies.

All of NCCR's member companies administer employee benefit plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* These ERISA plans provide billions of dollars of employee benefits to members' employees and beneficiaries. While members incur significant costs and bear substantial administrative burdens in creating and administering ERISA plans, members receive various protections from ERISA provisions that enable them to reduce their administrative costs and reduce their exposure to legal liability, including ERISA's policy of providing "ready access to the Federal courts," preemption of state laws, and empowerment to seek equitable relief.

This case has a direct and adverse bearing on the effectiveness of ERISA's preemption and equitable relief protections. This erosion of these protections is of significant interest and concern to NCCR and its members.

## SUMMARY OF ARGUMENT

NCCR is confident that the Petitioners will persuasively argue the legal reasons that the Court should grant their

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contribution toward the preparation or submission of this brief was made by any person other than *amicus curiae*, its members, and its counsel.

petition to resolve the conflict among the Circuit Courts involving the interpretations of the Anti-Injunction Act ("AIA"), 28 U.S.C. § 2283, and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, at issue in this matter. NCCR would like to emphasize, however, two critical praetical points. First, ERISA's creation of "ready access to the Federal courts," in addition to and in connection with its preemption and equitable relief provisions, are of vital importance to employers who create and administer ERISA plans. Second, the Fourth Circuit case below erodes the effectiveness of these protective provisions and thereby acts as a disincentive to employers to create and administer costly and complicated ERISA plans. The results of this disincentive is the potential reduction or elimination of valuable benefits to employees across the country.

NCCR urges this Court to grant the petition for writ of *certiorari* and resolve the uncertainty that currently exists for employer fiduciaries with regard to their protections under ERISA.

## ARGUMENT

### I. ERISA'S PREEMPTION AND EQUITABLE RELIEF PROVISIONS ENCOURAGE EMPLOYERS TO CREATE UNIFORM EMPLOYEE BENEFIT PLANS.

The United States Department of Labor, which administers portions of ERISA, states that Title I of ERISA was "enacted to address public concern that funds of private pension plans were being mismanaged and abused."[2] Recent corporate scandals have jeopardized financially-secure retirements for

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[2] Employee Benefits Security Administration, *History of EBSA and ERISA* (visited July 26, 2004) <http://www.dol.gov/ebsa/aboutebsa/history.html>.

tens of thousands of Americans. The resulting damages have been redressed, in part, by the remedy provisions of ERISA. In the wake of such scandals, the courts should take great care to maintain all of the protections afforded by this important law.

All of NCCR's twenty-four members, representing fifty-six of the nation's largest chain restaurant and food service concepts, maintain ERISA plans for the benefit of their employees. The Fourth Circuit decision at issue is not limited to affecting vacation pay plans, such as Denny's. NCCR's members maintain a broad range of ERISA plans that provide nationwide benefits to employees, including health insurance, disability insurance, severance pay, and retirement benefits. For many, these benefits are equally as important, if not more important, than the wages they receive from their employment relationship. Indeed, an employer's benefit package often represents the deciding factor in an employee's ultimate employment-related decision.

Employee benefits would be nearly without value if they were not secure and dependable. Accordingly, Congress placed numerous safe-guards on ERISA plans. From reporting and disclosure requirements (both to governmental agencies, and to participants and beneficiaries), to records retention, to anti-discrimination tests, to plan termination and restoration requirements—Congress went to great lengths to protect the integrity and value of ERISA plans for employees and beneficiaries. Of greater import is the enormous responsibility Congress placed on ERISA fiduciaries. ERISA imposes on these fiduciaries the highest standard of conduct required under our law. In articulating this standard of conduct, ERISA provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and

familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104. Fiduciaries who violate this standard of conduct may be subject to civil and even criminal penalties.

Recognizing this extremely high standard of conduct placed upon ERISA fiduciaries, and given the all-encompassing nature and national importance of the rights and protections provided, Congress established broad preemption provisions. ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" with the exception of State laws which regulate insurance. 29 U.S.C. §§ 1144(a) and (b). Such preemption provides ERISA fiduciaries with confidence that their legal duties and responsibilities are satisfied if they comply with the numerous ERISA provisions. In addition, ERISA preemption reduces the costs of employee benefit plan administration by eliminating compliance with multiple state and local laws. This reduction in costs is critical to one of the primary objectives of ERISA, to encourage the formation of employee benefit plans. Finally, ERISA preemption also allows for national uniformity in employee benefit plan administration, which is extremely important for employers, like each of NCCR's members, who operate in multiple states.

ERISA's preemption protections apply to any employee welfare benefit plan or employee pension benefit plan established or maintained by a for-profit employee organization engaged in commerce or in any industry or activity affecting commerce. 29 U.S.C. §§ 1002 and 1003. Fiduciaries of these plans must have confidence in the protection of preemption. Congress provided a specific avenue to obtain such assurance, by expressly empowering fiduciaries to file civil actions in federal court. ERISA permits a civil action to be brought by a fiduciary "to enjoin any act or practice which violates any provision of [ERISA]

or the terms of the plan, or to obtain other appropriate equitable relief to redress such violations or to enforce any provisions of [ERISA] or the terms of the plan to obtain equitable relief to redress ERISA violations or enforce ERISA provisions." 29 U.S.C. § 1132(a)(3). Without this right, a fiduciary would be vulnerable to a state court deciding its plan is not covered by ERISA and/or the applicable state law is not preempted by ERISA, contemporaneous with a decision that its plan violates state law. The Fourth Circuit's decision at issue in this Petition has left fiduciaries defenseless to this one-two punch.

## II. THE FOURTH CIRCUIT'S DECISION ERODES ERISA'S PREEMPTION AND EQUITABLE RELIEF PROVISIONS AND MAY THEREBY DISCOURAGE EMPLOYERS FROM CREATING UNIFORM EMPLOYEE BENEFIT PLANS.

The Fourth Circuit has held that the Anti-Injunction Act ("AIA"), 28 U.S.C. § 2283, prohibits a federal court from issuing an injunction (or any declaratory relief that would potentially have a *res judicata* effect), sought pursuant to ERISA, related to a state court proceeding, even if that state court proceeding was initiated well *after* the injunctive or declaratory relief was sought in federal court. As Petitioners and other *amici* have surely noted, this holding severely restricts the effectiveness of ERISA's explicit empowerment to fiduciaries to obtain equitable relief in federal court. A conscientious fiduciary seeking to confirm its belief that a state law is preempted by ERISA will be thwarted simply by a party's filing suit in a state court any time before the federal court has ruled on the fiduciary's requested relief. This leaves the equitable protections and exclusive jurisdiction provided for by ERISA nearly meaningless.

If the Court denies Petitioners' petition and the divide among the Circuit Courts remains, fiduciaries will be left

vulnerable in many states to this unfair scenario. The fiduciary's best protection from a cause of action challenging its benefit plan under state law would be a ruling by the federal court that the plan is an "employee benefit plan" covered by ERISA and the state law is preempted by ERISA. However, in the states of the Fourth Circuit and others, a conveniently-timed state court action, even if filed well after the fiduciary exercises its rights under ERISA for equitable relief, divests the federal court's authority to make such a ruling. Such an inequitable result is contrary to the Congressional intent—and indeed, as argued by Petitioners, the statutory language—of ERISA and the AIA.

ERISA plans are complicated and expensive to administer. NCCR members cumulatively spend millions of dollars each year maintaining and administering their ERISA plans, which contain billions of dollars in assets. Such expenses include those associated with recordkeeping, annual reports, asset management, and benefit distribution. These expenditures are currently justified by the value of the ERISA benefits to the members' employees.

Eroding or eliminating the ERISA-provided protections of preemption and equitable relief will add considerable expense to employee plan administration. Without the ability to have a federal court declare that a state law is preempted by ERISA and/or enjoin an action attempting to enforce a state law preempted by ERISA, employers will incur significant amounts in litigation costs unnecessarily defending state court actions. Moreover, without the definitive ruling Congress empowered the federal courts to make that an employee benefit plan is a plan under ERISA and that a state law is preempted by ERISA, the forum jurisdiction may incorrectly rule that the plan is not covered by ERISA and the state law not preempted. Thus, in addition to litigation costs, employers may face substantial exposure to liability under preempted state laws. These additional and considerable

expenses may tip the scales in the cost-benefit analysis and dissuade employers from taking on the burdens of creating and administering an ERISA plan.

As this High Court has noted on several occasions, pension plan regulation is "exclusively a federal concern" and ERISA's preemption clause is "deliberately expansive." *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987) (internal citations omitted). Moreover, the introductory statement in the statute itself states that ERISA's policy is to provide "ready access to the Federal courts." 29 U.S.C. § 1001(b). Finally, Congress provided the district courts of the United States with *exclusive* jurisdiction of civil actions brought by a fiduciary for the equitable relief made available by the statute. 29 U.S.C. § 1132(e). Thus, Congress unequivocally provided the federal courts with all of the authority for resolving issues regarding ERISA.

The Fourth Circuit's decision eliminates this federal jurisdiction in any instance where a litigant has filed suit in state court, be it before, after, or contemporaneous with a suit brought in federal court for equitable relief under ERISA. In such a case, the party arguing ERISA preemption is left only with the hope that the state court will make the appropriate ruling on the ERISA affirmative defense in the state court proceeding. If the state court does not, the defending party has no federal judicial recourse, save an ultimate and discretionary appellate review by this Court. This is clearly contrary to Congressional intent.

The most egregious of results from the Fourth Circuit's decision is indeed the Petitioners' predicament. If the decision remains, the Petitioners are forced to defend themselves in state court against a state agency in a proceeding involving state law, with ERISA's "ready access to the Federal courts" having been denied them. The Fourth Circuit has slashed an enormous hole in ERISA's safety net, and the Petitioners will fall through into this unfavorable position.

If ERISA fiduciaries are robbed of the protections afforded them in the statute, protections afforded in exchange for their extremely high duties of care and responsibilities, the balance between the duties and the protections is significantly disturbed. The consequence of the lopsided result is a disincentive for employers to continue to create and administer costly employee benefit plans, plans which are of significant value to employees throughout the country.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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